

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP626

Cir. Ct. No. 2010FA1262

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE FINDING OF CONTEMPT IN RE THE MARRIAGE
OF LESLIE E. MARTIN III V. JEANNE S. A. MARTIN:**

LESLIE E. MARTIN, III,

APPELLANT,

V.

JEANNE S. A. MARTIN,

RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
RICHARD G. NIESS, Judge. *Affirmed.*

¶1 BLANCHARD, P.J.¹ Leslie Martin appeals the circuit court’s order holding him in continuing contempt for failing to make an equalization payment that the court ordered in this divorce case.² Leslie argues that the circuit court improperly exercised its discretion in granting Jeanne Martin’s motion for contempt because the amount of the equalization payment at issue was erroneous or ambiguous and because he did not willfully or intentionally withhold payment. He also argues that the court improperly exercised its discretion in setting remedial sanctions for the contempt that caused him to suffer harsh tax consequences and had no evidentiary basis. For the following reasons, I affirm.

BACKGROUND

¶2 Leslie and Jeanne were granted a judgment of divorce in August 2012. On November 21, 2012, the court issued a “Decision and Order on Property Division, Maintenance, Child Support, Contempt, and De Novo Review of Temporary Order.” In this order, the court, in pertinent part, determined that, based on the manner in which the parties’ property was divided:

[Leslie] thus owes [Jeanne] an equalizing payment of \$116,695 due within 60 days of this decision and order. [Jeanne] may choose to receive this payment from [Leslie’s] retirement accounts, in which case the transfer should be accomplished by QDRO [qualified domestic relations order], so that the tax impact to [Jeanne] will be deferred, and penalties avoided. [Leslie] is to bear the cost of preparing the QDRO.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² The parties share a surname, and therefore I identify them by first name.

¶3 The court held a hearing on January 18, 2013, to address issues remaining after the November 21 order. On the same day, the court entered a judgment that modified some of the terms of the November 21 order. The only modification relevant to this appeal is that the deadline for paying the \$116,695 equalization payment was extended to February 21, 2013.

¶4 From February through May 2013, the parties filed a number of motions seeking reconsideration and correction of alleged errors relating to the calculation of the marital estate and the property division in the January 18 judgment. The court held a hearing on July 25, 2013, to address only those portions of the parties' motions that could be construed as seeking error correction pursuant to WIS. STAT. § 806.07.

¶5 At this hearing, the court directed the parties to make a number of adjustments to the calculation of the marital estate and the property division ordered in the January 18 judgment, based on errors found in that judgment. Counsel for Jeanne submitted a proposed order to the court purportedly effectuating these changes, which the court signed on September 13, 2013. The September 13 order amended portions of the January 18 judgment that affected the property division between the parties by, for example, ordering that "the martial distribution be recalculated using the correct value of \$522,500 for the marital residence," and ordering that certain "omitted assets shall be included and the marital estate and the distribution thereof shall be recalculated to include those assets." However, the September 13 order did not recalculate the property division or the \$116,695 equalization payment stated in the November 21 order

and ordered in the January 18 judgment.³ The September 13 order also provided that “[a]ll prior orders not inconsistent with the terms herein shall remain in full force and effect.”

¶6 On August 26, 2013, prior to the court signing the September 13 order amending the January 18 judgment, Jeanne filed a motion for contempt. As pertinent to this appeal, Jeanne sought enforcement of the \$116,695 equalization payment ordered in the January 18 judgment.

¶7 At a hearing on the contempt motion, counsel for Leslie argued that Leslie could not be held in contempt for failing to make the equalization payment because, after the July 25 error-correction hearing and the September 13 order, “[t]here’s no defined amount [for the equalization payment] in any order” and Leslie cannot “be held in contempt because we still don’t have a final property division number.” Counsel also argued that Leslie could not be held in contempt for failing to pay the \$116,695 equalization payment in the January 18 judgment because that sum was an “erroneous amount.”

¶8 The circuit court granted Jeanne’s motion for contempt, explaining, as pertinent here, that Leslie “is in continuing contempt of this court for failing to make any payment on the \$116,695 equalization payment that was due on February 21, 2013.” The court found that Leslie had sufficient funds to pay this obligation, but “deliberately and willfully failed to do so.” Further, based on

³ The court asked the parties to draft the September 13 order modifying portions of the January 18 judgment and, in doing so, to recalculate the property division and the equalization payment. Counsel for Jeanne developed a spreadsheet showing various options for recalculation. However, the court did not include the spreadsheet as part of its September 13 order, and no recalculation of the property division or equalization payment from this spreadsheet was reflected in the September 13 order.

testimony of an expert, the court found that the Leslie had benefitted by retaining the funds he owed to Jeanne under the January 18 judgment, while Jeanne was “denied the ability to invest those funds for the 9.5 months that she has been waiting for this court ordered payment.” On this basis, the court held Leslie in contempt and ordered his commitment to jail, unless he paid all of the following within ten days: (1) the \$116,695 equalization payment; (2) attorney fees arising from litigation related to Leslie’s contempt; and (3) a penalty of \$14,666 in order to “compensate [Jeanne] for the lost time-value of money she was owed since February and to deny [Leslie] a reward for his contemptuous failure to pay.”

¶9 Leslie now appeals the circuit court’s contempt order.

DISCUSSION

¶10 Leslie makes two related arguments on appeal as to why the circuit court erred in holding him in contempt: (1) the \$116,695 that he was required to pay by the January 18 judgment was erroneous or ambiguous, and he cannot be held in contempt for failing to comply with an erroneous or ambiguous order; (2) because the amount of the equalization payment was erroneous or ambiguous, his failure to make the equalization payment was not willful or intentional. Separately, Leslie argues that I should reverse the remedial sanctions that the court imposed in the contempt order because (1) they resulted in a financial hardship for Leslie due to tax consequences; and (2) there was no evidentiary basis to support the \$14,666 penalty. For the following reasons, I reject each of Leslie’s arguments.

I. Contempt Order

¶11 “A person may be held in contempt if he or she refuses to abide by an order made by a competent court.” *Krieman v. Goldberg*, 214 Wis. 2d 163, 169, 571 N.W.2d 425 (Ct. App. 1997). In order to hold a person in contempt, a court must find that the person “is able to pay and the refusal to pay is willful and with intent to avoid payment.” *Id.* (quoted source omitted); *see also* WIS. STAT. § 785.01(1) (“Contempt of court’ means intentional ... [d]isobedience ... of the authority, process or order of a court[.]”). A circuit court’s use of its contempt power is reviewed for proper use of discretion. *Benn v. Benn*, 230 Wis. 2d 301, 308, 602 N.W.2d 65 (Ct. App. 1999).

¶12 I turn first to Leslie’s argument that he was not obligated to comply with the judgment requiring the equalization payment because the obligation set by the court was based on miscalculations. I need not reach the substance of this argument because the January 18 judgment was never set aside. “[O]ne may be held in contempt for failing to obey an order even if that order is clearly erroneous.” *Anderson v. Anderson*, 82 Wis. 2d 115, 118-19, 261 N.W.2d 817 (1978); *see also Getka v. Lader*, 71 Wis. 2d 237, 247, 238 N.W.2d 87 (1976). As Jeanne points out, the remedy for a person who has obligations under an order that he or she believes to be in error is to obtain relief from that order, not to refuse to comply with it. *See Getka*, 71 Wis. 2d at 247. Leslie does not challenge Jeanne’s legal argument, but instead points to the fact that he attempted to seek relief from the January 18 judgment by filing a motion for reconsideration with the circuit court on February 7, 2013. However, this is of no consequence under *Getka*.⁴

⁴ Leslie’s motion for reconsideration was deemed denied on April 18, 2013, because the circuit court did not decide the motion within 90 days after entry of the judgment. *See* WIS. STAT. § 805.17(3). On August 5, 2013, Leslie filed a notice of appeal from the January 18

(continued)

Leslie was obligated to make the equalization payment unless and until the January 18 judgment was set aside or the amount of the equalization payment was amended. *See id.* (subsequent appeal and reversal of injunction did not alter obligation of defendants to comply with such injunction until it was stayed or set aside).

¶13 Leslie also argues that the court should not have found him in contempt because the judgment terms were ambiguous, and “there can be no contempt where the order allegedly violated is vague or is subject to multiple reasonable interpretations. *See State v. Dickson*, 53 Wis. 2d 532, 193 N.W.2d 17 (1972).” Leslie argues that the equalization payment obligation in the January 18 judgment was ambiguous for two reasons: (1) it was unclear whether Leslie was to pay Jeanne in cash or from his retirement accounts and, thus, whether the \$116,695 amount needed to be “grossed up” to reflect tax consequences; (2) the equalization payment in the January 18 judgment was altered and, therefore, made ambiguous, by the July 25 hearing and the subsequent September 13 order.

¶14 Assuming without deciding that the law on which Leslie relies could apply here, and that he could not be held in contempt of the January 18 judgment for failure to make any equalization payments if the judgment was ambiguous, I reject Leslie’s arguments for the following reasons.

¶15 I disagree that the January 18 judgment was ambiguous as to the terms under which Leslie was to pay the equalization payment and whether that payment would need to be “grossed up.” The judgment explicitly stated that

judgment and the denial of his motion for reconsideration, but this notice of appeal was dismissed as untimely.

Jeanne “may choose to receive” the payment from Leslie’s retirement accounts. There is no dispute that Jeanne did not choose this option, and there is also no dispute that because she did not, she was to be paid in cash. Therefore, the payment did not need to be “grossed up.”

¶16 The premise of Leslie’s second ambiguity argument is that his obligation to make the equalization payment stated in the January 18 judgment “was altered and not in effect at the time of the contempt proceeding” because of what Leslie refers to as the court’s July 25 “rulings” and the written September 13 order purportedly modifying portions of the property division in the January 18 judgment. There are two problems with Leslie’s argument.

¶17 First, Jeanne’s motion for contempt was filed on August 26, prior to the court’s September 13 order. As the circuit court pointed out during the contempt hearing, the only applicable judgment from which Jeanne could move for contempt at that point was the January 18 judgment, which, regardless of the language in the subsequent September 13 order, was the only order in effect when Jeanne moved for contempt.

¶18 Second, Leslie concedes that, although the circuit court agreed with the parties on certain modifications to portions of the marital estate and property division during the July 25 hearing and in the September 13 order, the court did not recalculate the property division or the equalization payment either at the hearing or in the written order. Thus, the September 13 order did not set an amount for the equalization payment that conflicts with the unambiguous order in the January 18 judgment. Without a recalculation of the equalization payment, the January 18 judgment remained in place. In fact, this court previously dismissed

Leslie's appeal of the September 13 order on the ground that it was not a final order because it did not incorporate a recalculation of the property division.

¶19 The above discussion resolves Leslie's argument that he did not willfully or intentionally fail to comply with the terms of the January 18 judgment, because this argument appears to be based entirely on his assertion that the January 18 judgment was erroneous or ambiguous.

II. Remedial Sanctions

¶20 A court may impose remedial sanctions for continuing contempt of court, which may include “[p]ayment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.” See WIS. STAT. §§ 785.02, 785.01(3), 785.04(1)(a). The sanctions imposed must “serve remedial aims,” must be feasible, and must be “reasonably related to the cause or nature of the contempt.” See *Frisch v. Henrichs*, 2007 WI 102, ¶64, 304 Wis. 2d 1, 736 N.W.2d 85. Determining the type of remedial sanction to impose is a discretionary determination for the circuit court to make. *Benn*, 230 Wis. 2d at 308. A circuit court's factual findings will be upheld unless they are clearly erroneous. *Id.* at 307.

¶21 Leslie argues that the court improperly exercised its discretion in setting remedial sanctions that: (1) required him to withdraw money from his IRA and suffer harsh tax consequences as a result; and (2) compensated Jeanne \$14,666 for the lost value of the money Leslie owed her, without a sufficient basis.

¶22 As to his tax-related argument, Leslie asserts that his only source of money with which to purge the contempt order was to withdraw money from his IRA, which resulted in substantial tax consequences. He argues that causing him

to incur these tax consequences, thereby, “result[ing] in a significant diminution of the property awarded to [Leslie] in the divorce,” “cannot be said to be ‘reasonably related to the cause or nature of the contempt.’”

¶23 This argument appears to fail for a number of reasons, but it is sufficient to explain that the record supports Jeanne’s response on appeal that Leslie had other means by which to comply with the remedial sanctions. For one, Leslie owned a home with sufficient equity to purge his contempt. Leslie does not respond to this assertion in his reply brief, and I deem it to be conceded. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant’s failure to respond in reply brief to an argument made in response brief may be taken as a concession).

¶24 Turning to his second argument, Leslie asserts that the court lacked any factual basis to require Leslie to pay Jeanne \$14,666 to “compensate [Jeanne] for the lost time value” of the equalization payment during the time Leslie failed to pay her. This is incorrect. At the contempt hearing, an expert testified to the value Leslie had gained on the money owed to Jeanne during the months he delayed payment, which Jeanne argues on appeal “can also be argued to be the value [Jeanne] lost by not having the funds available to her.” As Jeanne points out, the circuit court considered this testimony when deciding how to establish the loss of value to Jeanne due to the untimely payments. Leslie not only fails to acknowledge this evidence in his principal brief, he fails to respond to Jeanne’s argument on this point in his reply brief, effectively conceding Jeanne’s argument. *See id.*

CONCLUSION

¶25 For the forgoing reasons, I affirm the decision of the circuit court holding Leslie Martin in contempt and imposing remedial sanctions.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

